752K (44) (34)

Nos. 05-908 and 05-915

Supreme Court, U.S.
FILED
OCT 10 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York (the "ABCNY") is one of the nation's oldest and largest professional associations with approximately 22,000 lawyers, who collectively continue the Association's 136-year tradition of pursuing political, legal, and social reform.[1] The ABCNY is home to over 160 committees, including the Committee on Civil Rights, the Committee on Diversity in the Profession, and the Committee on Education and Law. The ABCNY has long been involved in the struggle for equality of opportunity, including in the area of public education, and has addressed issues involving the improvement of educational opportunities and resources for New York City public school students. Most recently, it submitted an amicus curiae brief in support of plaintiffs seeking to vindicate the rights of New York City public school students to the opportunity for sound basic education guaranteed by the New York State Constitution. The ABCNY therefore has a keen interest in addressing the legality of efforts by local school boards to improve educational opportunities for their children by combating the rampant *de facto* segregation that exists in many urban school districts.

STATEMENT OF THE ISSUE

Whether Seattle or Louisville[2] can constitutionally engage in voluntary efforts to combat the adverse effects of *de facto* segregation in the public schools through an

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[1] The parties have filed letters with the Court consenting to all amicus curiae briefs. No counsel for a party authored this brief in whole or in part and no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] All references to Louisville refer as well to Jefferson County, which encompasses the city of Louisville.

assignment plan that makes race one factor to take into account to avoid *de facto* segregation.

SUMMARY OF THE ARGUMENT

In *Brown v. Board of Education*, the Court held that states and cities could not maintain segregated public school systems. In so holding, the Court recognized the profoundly destructive effect of segregated education on black school children, and acknowledged the basic truth that for these children, separate is inherently unequal. Recognizing that a segregated school system can be maintained just as surely by knowing inaction as by deliberate action, Seattle and Louisville have adopted school enrollment programs that attempt to prevent racial segregation by taking race into account as one factor among others in school assignments. A holding that these plans are unconstitutional would allow the evil that *Brown* condemned to replicate itself, with the same adverse impacts on black school children that *Brown* recognized as the inevitable consequence of school segregation.

Since *Brown*, it has become evident that the vast majority of urban schools will be *de facto* segregated unless school boards do something to prevent segregation from occurring. While numerous factors have contributed to this reality, the end result is undeniable: fifty years after *Brown*, the promise of ending racial segregation in public education and eliminating the educational and social disadvantages that accompany racially segregated schools has been lost in many of our nation's largest school districts. New York City is a particularly poignant case in point: it is widely known for its racial and ethnic diversity and eliminated *de jure* segregation long ago, yet its public schools are

among the most heavily segregated in the nation. Numerous schools reflect a level of racial segregation that has led prominent critics to label them "apartheid schools," and most New York City public school students attend schools whose racial and ethnic makeup has little or no relation to the demographics of the city in which they live.

While the circumstances of New York City and many of the country's other large cities are not the product of policies by school boards to promote segregation, the maintenance of segregated schools results with equal certainty when school boards adopt policies that accept and perpetuate *de facto* segregation. New York City is in fact an archetype of what happens in urban schools when nothing is done to counteract the effects of residential and social segregation in public school populations. *Brown* and its progeny identify a compelling state interest in integrated public schools, and local school boards should be permitted to take race into account to advance that interest, lest their schools fall victim to the *de facto* segregation exemplified by New York City's public schools and the adverse effects this has had on racially isolated public school students.

ARGUMENT

I. *BROWN* AND ITS PROGENY SET FORTH A COMPELLING GOVERNMENT INTEREST IN INTEGRATED PUBLIC SCHOOLS

"Separate educational facilities are inherently unequal." *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("*Brown I*"). Beginning with that statement, the Court has repeatedly announced that racial segregation has no place in our public schools. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 26 (1971) ("*Swann I*"); *Green v.*

County Sch. Bd., 391 U.S. 430, 436 (1968) ("The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about."); *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1958) ("The principles announced in [*Brown*] . . . are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."). This basic truth is now part of the bedrock of American society. *See, e.g.*, President George W. Bush, Remarks at Grand Opening of Brown v. Board of Education National Historic Site (May 17, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/05/print/20040517-4.html (describing *Brown I* as "a decision that changed America for the better, and forever," by causing "[t]he system of racial oppression in our country [to lose] its claim to legitimacy"). *Brown* and its progeny recognize that to prevent integration of schools and promote segregation is not only unconstitutional, but also wrong. *See Swann I*, 402 U.S. at 15 (characterizing segregation as "the evil struck down by Brown I"); *see also Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("Segregation in public education is not reasonably related to any proper governmental objective.").

Under *Brown v. Board of Education*, 349 U.S. 294 (1955) ("*Brown II*"), it is local school authorities that are primarily responsible for integrating their schools. *Id.* at 299. In carrying out this responsibility, they are to "make every effort to achieve the greatest possible degree of actual desegregation," *Swann I*, 402 U.S. at 26, so as to obtain a public school "system without a 'white' school and a 'Negro' school, but just schools." *Green*, 391 U.S. at 442. Setting forth the goal of converting segregated schools "to a unitary system in which racial discrimination [is] eliminated root and branch," *id.* at 437-38, the Court has made clear that fostering integration, and not merely prohibiting

overt segregation, is the principle underlying its opinions. *See Balaban v. Rubin*, 20 A.D.2d 438, 447, 248 N.Y.S.2d 574, 583 (2d Dep't) ("[T]he Brown cases constitute a clear mandate to the Boards of Education, in selecting the site for a new school and in establishing its attendance zone, to act affirmatively in a manner which will prevent *de facto* segregation in such new school."), *aff'd*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

While *Brown* and its progeny deal with *de jure* segregation, the harms to minority children from segregated schools are just as severe from the *de facto* segregation that exists in so many urban school districts, and the compelling state interest in eliminating those evils and providing an integrated public school system is just as great. If local school districts, which are in the best position to judge local facts and local needs, are disabled from considering race as a factor in school assignment programs designed to remedy *de facto* segregation, more cities are likely to become like New York City, where, despite a diverse urban population, the public schools are overwhelmingly segregated by race.

II. THE GOAL OF INTEGRATION SET FORTH IN *BROWN* AND ITS PROGENY HAS NOT BEEN REALIZED IN NEW YORK CITY, LEAVING IN ITS PLACE THE VERY HARMS THIS COURT OBSERVED FIFTY YEARS AGO

New York City illustrates what a twenty-first century American city's school system may look like, absent the ability to consider race to avoid *de facto* segregation in the public schools. One of the most racially and ethnically diverse cities in the country, New York has long prided

itself on its open-mindedness and its openness to peoples from around the world. New York nonetheless has some of the most segregated schools in the nation. This *de facto* segregation, and the damage it causes to minority students who suffer from it, are an object lesson in why school districts like Seattle and Louisville that are still capable of avoiding *de facto* segregation through racial balancing programs should be permitted to do so.

A. New York City's Schools Are Some Of The Nation's Most Racially Segregated Institutions

To many Americans, New York City with the Statue of Liberty and its multiplicity of ethnicities is the nation's symbol of diversity. Whites, blacks, and Latinos[3] each constitute at least 25% of New York's population of more than 8 million residents.[4] Despite its reputation for diversity and its diverse demographics, however, New York City is like most American cities in that an overwhelming majority of its residents not only reside, but also are educated, in racial isolation.[5]

David Dinkins, the former mayor of New York City, has observed that "New York is a 'tale of two cities,' and it

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[3] The terms "Latino" and "Hispanic" are used synonymously for the purposes of this brief and as the author used them in the original source.

[4] *See, e.g.*, John Logan & John Mollenkopf, *People & Politics in America's Big Cities* 14 (Drum Major Institute for Public Policy May 15, 2003) (breakdown of 35.0% white, 25.6% black, 27.0% Latino, and 10.6% Asian, according to 2000 Census).

[5] Nearly 100 boundary changes were made in New York City from 1959 to 1963 in attendance areas for public schools in an effort to desegregate; despite these changes, the "extent of segregation in the city's schools was greater in 1963 than it had been in 1958." Jonathan Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America* 190 (2005).

should come as no surprise that each of these cities has its own school system."[6] How did New York, with its "image as a pioneer in civil rights, become the epicenter of segregated public education?"[7] Pervasive segregation of New York City's residential housing, which remains at the same level today as in 1960, is largely to blame.[8] Historically segregated housing patterns, as in most American cities, have resulted in racial polarization in New York City's five boroughs.[9] Black-nonblack segregation is particularly striking: almost half of the city's 42 neighborhoods (designated as such by the New York City Department of Health and Mental Hygiene) are less than 10% black, while almost a quarter of New York City's neighborhoods are less than 9% white.[10]

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[6] *Id.* at 141 (quoting David Dinkins, Manhattan Borough President in 1986 before being elected Mayor of New York City) (quotation marks omitted).

[7] *Id.* at 32 (internal quotation marks omitted).

[8] *Id.*

[9] For example, Manhattan's celebrated neighborhoods are often divided by race. The north Manhattan neighborhood of Inwood-Washington Heights is 71% Hispanic. N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Inwood and Washington Heights, Manhattan*, at 2 (2003). Directly south of this area is Central Harlem-Morningside Heights, which is 67% black. N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Central Harlem, Manhattan*, at 2 (2003). Continuing south, Manhattan's Upper East Side is 82% white. N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of the Upper East Side, Manhattan*, at 2 (2003). Lower Manhattan (including Chinatown) is 53% white and 24% Asian. N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Lower Manhattan*, at 2 (2003); *see* Logan & Mollenkopf, *supra* note 4, at 16-17.

[10] *See, e.g.*, N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Southwest Brooklyn*, at 2 (2003)

Like most of the nation's cities, including Seattle[11] and Louisville,[12] New York City has schools that are even more segregated than its neighborhoods. Students of color in New York City are likely to attend schools that are more segregated than the already racially divided neighborhoods in which they reside, with many of the city's schools as segregated, if not more segregated, than they were thirty years ago.[13] For New York City the "overall scale of racial isolation . . . is so extreme" that critics have used the term "apartheid education" to describe New York City school's racial imbalance.[14]

In fact, most of the city's school-age population attends segregated schools. New York City is the sixth most segregated city in the nation for black schoolchildren,[15] with the

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(1% black); N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Hunts Point and Mott Haven, Bronx*, at 2 (2003) (1% white).

[11] *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166 (9th Cir. 2005) ("Seattle public school enrollment breaks down nearly inversely [to residential demographics], with approximately 40 percent white and 60 percent nonwhite students."), *cert. granted*, __ U.S. __, 126 S. Ct. 2351 (2006).

[12] *See* Stip. of Facts ¶ 36 (student enrollment in Jefferson County public schools is approximately 34% black and 66% "other"); *see also McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 840 n.6 (W.D. Ky. 2004) (county does not distinguish between white, Hispanic, and Asian students), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, __ U.S.__ , 126 S. Ct. 2351 (2006) (per curiam).

[13] Kozol, *supra* note 5, at 19.

[14] *Id.* at 236.

[15] *See* John Logan, Dierdre Oakley & Jacob Stowell, *Choosing Segregation: Racial Imbalance in American Public Schools 1999-2000*, at 9 (Lewis Mumford Center for Comparative Urban and Regional Research, University of Albany Mar. 29, 2002).

average black child attending a school that is overwhelmingly black.[16] New York City is the third most segregated city in the nation for both Hispanic[17] and Asian children.[18]

The school-age population of children in New York City's public schools is currently 14.3% white, 33.1% black, 39.0% Hispanic, and 14.3% Asian.[19] While these figures show that the overall public school population is less diverse than the city's population, the racial segregation within individual schools is even more pronounced. Many members of each racial group attend schools that are dominated by a particular racial group, and in some cases, in near total racial isolation.[20] For example, Tottenville High School in Staten

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[16] The average black child in New York City will attend a school that is 60.8% black. *See id.* at 10.

[17] *Id.* at 13.

[18] *Id.* at 16.

[19] *See, e.g.*, N.Y. City Dep't of Educ., *2004-2005 Annual Regional Report, Region 7*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/7.pdf (last visited Oct. 3, 2006). In contrast, New York City's overall population is 35.0% white, 25.6% black, 27.0% Latino, and 10.6% Asian. *See* Logan & Mollenkopf, *supra* note 4, at 14.

"White flight" to private schools and to the suburbs of New York is a significant factor behind these numbers. *See generally* Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. Gender Race & Just. 163, 195 (1999) (describing white flight from urban public schools during the 1970s); *see also* Editorial, *Segregation Reigns on LI*, Newsday, Aug. 21, 2006, at A32 (whites comprise 70% of all students on Long Island and attend schools that are 81% white and 5% black; blacks comprise 11% of all students); Jonathan Kozol, *Segregated Schools: Shame of the City*, Gotham Gazette, Jan. 16, 2006, *available at* http://www.gothamgazette.com/article//20060116/202/1718 ("Only one percent of [suburban Bronxville's] students are black or Latino.").

[20] *See* Kozol, *supra* note 5, at 17; *cf.* Gary Orfield & John T. Yun, *Resegregation in American Schools* 19-20 (The Civil Rights Project at

Island is 81.1% white,[21] P.S. 6 on Manhattan's Upper East Side is 77% white,[22] P.S. 114 in Belle Harbor Queens is 81.4% white,[23] and P.S. 195 in Manhattan Beach, Brooklyn is 87.1% white,[24] whereas P.S. 65 in Mott Haven, Bronx has no white students but is 29.3% black and 70.5% Hispanic,[25] and P.S. 6 in East Flatbush, Brooklyn is comprised of nearly all

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Harvard University 1999) (measuring segregation by percentage black students in majority white schools, percentage white students in typical black student's school, and percentage of black students in 90-100% minority schools, respectively).

[21] The racial breakdown is 81.1% white, 2.7% black, 9.0% Hispanic, and 7.2% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 7, H.S. 455*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/531455.pdf (last visited Oct. 3, 2006).

[22] The racial breakdown is 77% white, 5.9% black, 9.2% Hispanic, and 7.9% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 9, P.S. 6*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/102006.pdf (last visited Oct. 3, 2006).

[23] The racial breakdown is 81.4% white, 8.2% black, 6.1% Hispanic, and 4.3% Asian. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 5, P.S./M.S. 114*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/427114.pdf (last visited Oct. 5, 2006).

[24] The racial breakdown is 87.1% white, 6.3% black, 4.1% Hispanic, 2.4% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 6, P.S. 195*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/322195.pdf (last visited Oct. 5, 2006).

[25] The racial breakdown is 0.0% white, 29.3% black, 70.5% Hispanic, 0.2% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 9, P.S. 65*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/207065.pdf (last visited Oct. 3, 2006).

black students (88%) with an insignificant 0.4% white population.[26]

The most academically successful schools in New York City "tend [ ] to be clustered in more privileged communities" and are just as segregated as their non-elite counterparts.[27] Predictably, private schools exhibit this characteristic,[28] but so do New York City's three most elite public high schools: Stuyvesant High School in lower Manhattan is only 5.6% black or Hispanic;[29] Bronx High School of Science is only 13.4% black or Hispanic;[30] and Brooklyn Technical High School is 24.7% black

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[26] The racial breakdown is 0.4% white, 88.8% black, 10% Hispanic, and 0.8% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 6, P.S. 6*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/317006.pdf (last visited Oct. 3, 2006).

[27] Kozol, *supra* note 5, at 203.

[28] The racial breakdown of New York City private schools is 66% white, 13.7% black, 15.5% Hispanic, and 4.7% Asian; 15% of New York City students attend private schools. *See* Andrew Beveridge, *High School Students*, Gotham Gazette, Apr. 28, 2005, *available at* http://www.gothamgazette.com/article/demographics/20050428/5/1395. The disparity is much greater for non-Catholic religious private high schools, which are 93.3% white, 2.7% black, 1.5% Latino, and 2.4% Asian, and non-religious private high schools, which are 76.8% white, 9.7% black, 5.1% Latino, and 8.3% Asian. *Id.*

[29] *See* N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 9, H.S. 475*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/102475.pdf (last visited Oct. 3, 2006) (38.5% white, 2.6% black, 3.0% Hispanic, and 55.9% Asian and others).

[30] *See* N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 1, H.S. 445*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/210445.pdf (last visited Oct. 3, 2006) (32.9% white, 5.7% black, 7.7% Hispanic, and 53.7% Asian and others).

or Hispanic.[31] In contrast, *71.4%* of the general public school population is black or Hispanic.[32]

Moreover, these statistics reflect a nationwide trend towards public schools actually becoming more racially segregated.[33] In 1979, blacks made up nearly 13% of Stuyvesant's student body;[34] by 1995, the black student percentage there had fallen to 4.4%,[35] and today blacks are a meager 2.6% of Stuyvesant's enrollment. As these high schools are prohibited by statute from using race as a factor in their admissions process, with students admitted solely by competitive examinations whose results reflect the negative effects of segregated primary schools, the New York City Department of Education has found no viable alternative to address this steady decline in black enrollment.[36]

W.E.B. Dubois wrote one hundred years ago that "[i]t is a hard thing to live haunted by the ghost of an untrue dream."[37] Unfortunately, the dream of integrated schools

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[31] *See* N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 8, H.S. 430*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/313430.pdf (last visited Oct. 3, 2006) (26.5% white, 15.8% black, 8.9% Hispanic, and 48.8% Asian and others).

[32] *See* Elissa Gootman, *In Elite N.Y. Schools, a Dip in Blacks and Hispanics*, N.Y. Times, Aug. 18, 2006, at A1.

[33] *Id.*

[34] *Id.*

[35] *Id.* In 1995 blacks constituted 11.8% of Bronx Science and 37.3% of Brooklyn Tech.

[36] *Id.* Although the city has developed some tutorial assistance programs aimed at minority students to increase enrollment at Stuyvesant, for example, the help is insufficient and ill-suited to address the deep seated roots of this problem.

[37] Kozol, *supra* note 5, at 274 (quoting W.E.B. DuBois, *The Children of Disappointment*, *in* The Souls of Black Folk (1990)).

following *Brown* has become such a ghost in many of our cities, as in New York City; the hope for integrated schools has been displaced by the reality of *de facto* segregation.

B. The Negative Effects Of Segregated Schools On Minority Children That The Court Observed In *Brown* And Its Progeny Are Evident In New York City's *De Facto* Segregated School System

While the Court in *Brown* and its progeny first noted the damaging effects of school segregation in the context of *de jure* segregation, the same harms are also prevalent in today's *de facto* segregated schools.[38] Segregated schools—whether *de jure* or *de facto*—are "institutions of concentrated disadvantage"[39] that systematically fail minority students.[40] Students in predominantly minority districts are more likely to attend schools with inadequate resources, are more likely to have unqualified teachers, are more likely to be counseled with lower expectations, and are more likely to be tracked into lower quality academic programs.[41] The New York Court of Appeals found this to be the case in New York City where public schools with the highest per-

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[38] Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 Am. U. L. Rev. 1307, 1331 (Summer 1990) (observing that any "[d]ifferentiation between de jure and de facto segregation, however, is largely illusory").

[39] Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 7 (The Civil Rights Project at Harvard University Jan. 2005).

[40] *See Brown I*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal.").

[41] *See* Claude M. Steele, *Not Just a Test*, The Nation, May 3, 2004, at 3 (reviewing conclusions of scholarly research on effects of segregation and author's own research).

centage of minority children "have the least experienced, the most uncertified teachers, the lowest-salaried teachers, and the highest rates of teacher turnover."[42]

Minority students attending segregated schools also internalize the degrading effects of segregation. In addition to feelings of shame and anger, minority students attending segregated schools have lower expectations of themselves.[43] "It's like we are being hidden," says one female student in New York City who attends a segregated public school in the Bronx.[44] "It's as if [students of color] have been put in a garage where, if you don't have room for something but aren't sure if they should throw it out, they put it there where they don't need to think of it again," she says of her attendance at her decrepit school.[45] She continues to explain her feeling of neglect by concluding, "[i]f people in New York woke up one day and learned that we were gone, that we had simply died . . . I think they'd be relieved."[46]

Despite the fact that a high school education is considered the basic minimum requirement for an individual's education, only half of black, Hispanic and Native American students graduate from high school.[47] In New York

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[42] *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 909, 801 N.E.2d 326, 333, 769 N.Y.S.2d 106, 113 (2003) (quotation marks and citation omitted).

[43] *See Brown I*, 347 U.S. at 494.

[44] Kozol, *supra* note 5, at 28 (internal quotation marks omitted).

[45] *Id.* (internal quotation marks omitted).

[46] *Id.* at 28-29 (internal quotation marks omitted).

[47] Christopher Swanson, *Who Graduates? Who Doesn't? A Statistical Portrait of High School Graduation, Class of 2001*, at 2 (Education Policy Center and the Urban Institute 2001).

City, public school students in high minority districts have extremely low graduation rates, especially black and Latino males.[48] Studies show that, independent of poverty, the level of segregation and the lack of exposure to white students for minority students is a strong predictor of failure to graduate from high school.[49] While the graduation rates at affluent white schools are near 100%, in high minority districts less than 50% of all ninth graders graduate within four years.[50]

As former Assistant United States Attorney General and member of the Washington D.C. Board of Education Roger Wilkins noted, "I used to feel sick at graduations when I saw how many of the ninth grade students had been lost in those four years. It was like seeing an army regiment returning from a war . . . look at these young black people who have fallen by the way."[51] Nationally, in schools that are comprised of at least 90% students of color, only 42% of freshman even advance to grade 12.[52] These segregated

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[48] Gary Orfield, Daniel Losen & Johanna Wald, *Losing Our Future* 56 (The Civil Rights Project at Harvard University Mar. 2004) ("The district data showing low graduation rates in high minority districts are consistent with the findings . . . that segregation and percentage of minority students in a district had a strong relationship with low graduation rates, independent of poverty.").

[49] *Id.* at 6.

[50] Christopher Dunn & Donna Lieberman, Op-ed, *Deepening Racial Isolation and Despair for Black and Latino Children in New York's Public Schools*, Newsday, June 24, 2003, at 2; *see also Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 914, 801 N.E.2d 326, 336, 769 N.Y.S.2d 106, 116 (2003).

[51] Kozol, *supra* note 5, at 239 (internal quotation marks omitted).

[52] Orfield & Lee, *supra* note 39, at 6.

schools are afflicted by "lower levels of competition by peers, less qualified and experienced teachers, narrower and less advanced course selection, more student turnover during the year, and students with more health and emotional problems related to . . . living in [the] ghetto."[53] Few whites, even poor whites, ever experience such schools.[54]

New York City's largely separate and unequal schools exhibit the same dismal statistics. Only 30.1% of Latinos and 32.2% of blacks graduate from high school in New York City.[55] The New York Court of Appeals found that New York City's graduation rate compares unfavorably with the state and nation, which the court considered "symptomatic of a system breakdown."[56] The segregated schools having the highest concentration of minority students are frequently also the poorest, with blacks and Hispanics often attending class in run-down buildings, having few academic and extra-curricular resources, and being taught by uncertified or poorly trained teachers.[57] The overwhelming majority of students at two of New York City's largest high schools—which are both 98% black and Hispanic—did not pass a single one of the state's five required Regents tests required for graduation, a striking

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53 Orfield et al., *supra* note 48, at 7.

54 Orfield & Lee, *supra* note 39, at 6.

55 Swanson, *supra* note 47, at 38.

56 *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 914, 801 N.E.2d 326, 337, 769 N.Y.S.2d 106, 117 (2003) (quotation marks and citation omitted).

57 *See* Gail Robinson, *Fifty Years After Brown*, Gotham Gazette, May 17, 2004, *available at* http://www.gothamgazette.com/article//20040517/200/981.

illustration of the substandard quality of education for New York City's most vulnerable children.[58]

In sum, the segregation of New York City's public schools severely undermines minorities' educational development and future opportunities. The devastating effect of racial segregation is "a national horror hidden in plain view,"[59] preventing fulfillment of the promise of integration proclaimed by the Court in *Brown*.

III. VOLUNTARY EFFORTS TO DESEGREGATE PUBLIC SCHOOLS, INCLUDING THROUGH THE CONSIDERATION OF RACE, NOT ONLY ARE CONSTITUTIONAL, BUT ALSO ADVANCE THE PRINCIPLES OF *BROWN* AND ITS PROGENY

Faced with the prospect of becoming like New York City already is, Seattle and Louisville have decided that it is in the best interests of their students and communities to try to avoid *de facto* (and, in the case of Louisville, the continuing effects of former *de jure*) segregation in their school system. Having identified a compelling state interest in integrated public schools, they have determined that race is a factor that must be considered to remedy the problem of *de facto* segregation.

A. There Is A Compelling State Interest In The Benefits Of Integrating Public Schools

Confronted with the adverse impact of segregated schools—reinforced racial isolation, the concentration of poverty, internalized anger and lowered expectations and

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[58] *See* Tamar Lewin, *More Students Passing Regents, But Achievement Gap Still Persists*, N.Y. Times, Mar. 18, 2004, at B1.

[59] Kozol, *supra* note 5, at 240 (quoting Roger Wilkins) (quotation marks omitted).

consistently low levels of achievement for students of color—Seattle and Louisville, along with other cities across the country, have identified a compelling state interest in integrating their public schools. Aware of both the harms resulting from segregation, and the benefits that have been identified for students of all races and ethnicities who attend integrated public schools, the local school boards of these cities have determined that a plan of integration is in the best interest of their students and communities.

That Seattle and Louisville's local school boards have determined that voluntarily integrating their schools is in their students' and communities' best interests is not surprising. Numerous studies show that substantial benefits in both intellectual and social development are common for children enrolled in integrated schools.[60] In an increasingly multiracial society, exposure to racially integrated schooling can help combat racial prejudice as well as "break the tendency for racial segregation to become self-perpetuating for all students later in life."[61] Integrated schools have a myriad of educational benefits that segregated schools do not. *See Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 16, 18-19 (1st Cir. 2005) (en banc) (including the "preempt[ion of] racial stereotypes through intergroup contact," which "ameliorate[s] racial and ethnic tension and [fosters] interracial tolerance," as well as the "positive impact of racial diversity on student safety and attendance"), *cert. denied*, __ U.S. __, 126 S. Ct. 798 (2005). Students of all races who attend diverse, integrated schools have been shown to feel more comfortable about living

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[60] Orfield & Lee, *supra* note 39, at 40.

[61] *Id.* (quoting Wells & Crain, Perpetuation Theory and Longterm Effects of School Desegregation) (quotation marks omitted).

near and working with people of different backgrounds.[62] Moreover, as the world of work and citizenship is an integrated one, schools that are segregated by race cannot prepare students for that world. *See* State Education Commissioner's Advisory Committee on Human Relations and Community Tensions, *Desegregating the Public Schools of New York City: A Report Prepared for the Board of Education of the City of New York*, at ix-x (May 12, 1964) (Addressing "the education necessity to prepare every child to take his place in a world where no race may any longer live alone. . . . [I]t cannot be denied that a child who has learned from experience to understand and appreciate people of races other than his own has a sounder basis for both this education and his life.").

The Court has recognized these "substantial" benefits arising from a diverse classroom. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). In *Grutter*, the Court found that a diverse class "promotes cross racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races . . . . These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id.* (quotation marks and citation omitted). As the Court noted, expert studies and reports have found that diverse student bodies "better prepare[ ] students for an increasingly diverse workforce and society, and better prepare[ ] them as professionals." *Id.* (quotation marks and citation omitted).[63]

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[62] *Id.*

[63] The Court further noted that this was not only important for the students but also required by "American businesses [that] have made

The Court's observations are borne out by common experiences and common sense. A black adult, whose mother had her bused across town to a school that welcomed inner-city youth, said of her suburban, predominately white school that "everyone talked about college so she just assumed that she would go to college too."[64] By the time she enrolled at Brown University (to which she had applied, without any personal knowledge of the school, because a much-admired peer had gone there), this student observed, "I had already sat next to white student . I had already been on teams and in student politics with them . . . I could deal with the academic part and wasn't stressed about the social part."[65] After graduating, working, and eventually attending graduate school, she said that "[n]one of that would have been possible if [I] had not gone to integrated schools."[66]

The profound impact from integrating a city's public schools is also apparent in an examination of those cities that have followed this course. The public schools in Lynn, Massachusetts have been racially and ethnically integrated starting at the primary level since 1988 due to the district's voluntary desegregation plan.[67] Researchers who surveyed

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clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." *Id.*

[64] This comment was made by a student whose mother had her bused from Boston to suburban Lexington, Massachusetts, one of the 32 districts in its area that are a part of one of the longest-lasting voluntary integration programs in the nation. Kozol, *supra* note 5, at 229.

[65] *Id.* (internal quotation marks omitted).

[66] *Id.* at 230 (internal quotation marks omitted).

[67] Michael Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity in Educational Outcomes: Lynn, MA School District 2* (The Civil Rights Project at Harvard University Feb. 2002).

student experiences found positive educational impacts from diversity for students in the district.[68] First, students of all racial and ethnic backgrounds reported being "comfortable" or "very comfortable" working for a supervisor from a different racial background than their own.[69] Second, all Lynn students, regardless of their racial background, held high educational aspirations and felt that their schools promoted these aspirations to students equitably.[70] Lynn's integrated schools have successfully fostered an educational environment that students themselves feel provides the skills "necessary to live and work in diverse environments."[71]

The desire to give children "access to the majority culture, so they could negotiate it more confidently"[72] is not limited to the residents of cities like Seattle and Louisville that have voluntary school integration plans. National surveys show that over two thirds of Americans believe that "desegregation improves education for blacks" and a "growing population is convinced that it has positive effects for whites as well."[73] Importantly, 60% of young adults surveyed believe that the federal government has the responsibility to make sure that public schools are inte-

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68 The students surveyed in the Lynn School District identified themselves as 41.5% white, 11.2% African American, 17.7% Latino, 0.7% Native American; 8.7% stated "other" and 3.6% declined to identify themselves. *Id.* at 3.

69 *Id.* at 7.

70 *Id.* at 11.

71 *Id.*

72 Kozol, *supra* note 5, at 229.

73 *Id.* at 233.

grated.[74] These studies show that the majority of Americans want the integrated schools that this Court envisioned fifty years ago in *Brown*. However, under the conditions prevailing in many urban areas, school integration may be possible only if race is made a permissible factor in assigning students to schools.

B. The Consideration Of Race Is Appropriate And Necessary To Advance The Compelling State Interest In Integrated Public Schools

The integration of segregated schools cannot be achieved without using race as at least one factor in the school assignment process. When attempting to address issues of racial segregation it is almost axiomatic that race should be taken into consideration. The Court acknowledged this reality in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971) ("*Swann II*"), where a North Carolina statute prohibited school assignments "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins." *Id.* at 44 n.1. Observing that this "'color blind' . . . requirement, against the background of segregation, would render illusory the promise of *Brown*," the Court held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.* at 45-46 (noting further that the statute "would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems").

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[74] *Id.*

Judge Kozinski's concurrence in the Seattle case cogently reasoned that a less demanding standard than strict scrutiny was appropriate in reviewing the Seattle racial balance plan, which treats whites and blacks exactly the same.[75] But even assuming that strict scrutiny is the proper standard whenever race is a factor at all, where, as here, a compelling interest exists, race may be used as a factor so long as its use is narrowly tailored to achieve that interest.[76] Narrow tailoring generally requires the proponent to show that a plan or practice is (i) necessary to the declared purpose, (ii) proportional to the declared purpose, and (iii) not more burdensome than necessary on third parties.[77]

The use of race as a factor in integrating schools is necessary and proportional because in many instances race-neutral alternatives are not effective in addressing the issue of segregation. School districts looking at race-neutral alternatives, such as lotteries, magnet schools, no-transfer policies, unrestricted transfers, redrawing district lines, forced busing, and plans based on socioeconomic status, have determined that these plans simply do not work. In *Comfort* the Lynn School Committee looked at all of these options, only to find that each alternative either was ineffective or impractical or exacerbated the racial imbalance. *See Comfort*, 418 F.3d at 7, 22. Specifically, the Committee found that magnet schools were "only modestly successful in alleviating racial imbalance," *id.* at 7, a

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[75] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring), *cert. granted*, __ U.S. __, 126 S. Ct. 2351 (2006).

[76] *Comfort*, 418 F.3d at 16.

[77] *United States v. Paradise*, 480 U.S. 149, 187 (1987) (Powell, J., concurring).

finding supported by other school districts.[78] Lotteries and redrawing of district lines were considered impractical. *Id.* at 22 (observing that redrawing district lines would not be viable, and that "demographic and scheduling factors made [a lottery system] impracticable"). Even worse, the Committee found that no-transfer policies, unrestricted transfers, forced busing, and plans based on socioeconomic status only deepened the racial segregation or created other unrelated problems. *Id.*; *see also Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 374, 387-89 (D. Mass. 2003) ("There are good reasons to give deference to school boards' . . . determinations of whether race-neutral alternatives are adequate. They are the experts in what will or will not work because they are uniquely attuned to the needs of a diverse urban community;" discussing in detail the problems of race-neutral alternatives), *aff'd*, 418 F.3d 1 (1st Cir.), *cert. denied*, __ U.S. __, 126 S. Ct. 798 (2005).

The limits of race-neutral alternatives are supported by scholarship suggesting that these methods simply do not alleviate segregation in elementary and high schools. As one expert on voluntary integration plans has written: "Relying solely on racially neutral policies has simply not proven successful in preventing racial segregation in the K-12 arena. Realistically, race must be taken into account in order to address this compelling government interest."[79]

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[78] *See* Sandy Banks, *Mixed Results for L.A.'s Magnet Schools*, L.A. Times, Jan. 20, 2006, at 1 (87 of Los Angeles Unified School District's 162 magnet schools "are virtually all black or Latino, and almost all of those considered integrated—those with 30% white students—are in or near the San Fernando Valley or the Westside").

[79] Celia M. Ruiz, *Can Voluntary Racial Integration Plans at the K-12 Educational Level Meet Grutter's Constitutional Standard?*, 67 Ohio St. L.J. 303, 319 (2006).

Nor is it feasible, at the grade school level, to consider race only as part of the individual consideration of each student, as was done at the graduate school level in *Grutter*. As one commentator has noted, "demanding that K-12 schools use race only in the same manner as universities ignores the fundamental differences between those institutions."[80]

Simply stated, race-neutral alternatives alone cannot solve long-standing problems such as residential segregation[81] and white flight into private schools (which are 66%–93% white in New York City[82]) and the suburbs,[83] all of which contribute to school segregation. Under these circumstances, failing to use race as a factor in assigning students to schools renders the promise of *Brown* illusory. The Court should not foreclose other state and local governments that want to try to avoid what has happened in New York City from using race as a factor in voluntary efforts to reduce *de facto* segregation in their public schools. *See Swann I*, 402 U.S. at 16; *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 713 (2d Cir. 1979) (though "there is no judicially-enforceable constitutional obligation" to remedy *de facto* segregated school system,

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[80] James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 Ohio St. L.J. 327, 342 (2006).

[81] *See, e.g., Monroe v. Bd. of Comm'rs of City of Jackson*, 391 U.S. 450, 458 (1968) ("Because the homes of Negro children are concentrated in certain areas of the city, a plan of unitary zoning, even if prepared without consideration of race, will result in a concentration of Negro children in the zones of heretofore 'Negro' schools and white children in the zones of heretofore 'white' schools.") (quotation marks and citation omitted).

[82] *See supra* note 28.

[83] *See supra* note 19.

"[i]t is permissible . . . for local officials to attempt voluntarily to correct or combat such an imbalance").

C. Courts Should Defer To Local School Boards In Their Determination Of What Means To Use To Address *De Facto* Segregation

The decisions of the local school boards in Seattle and Louisville that it would be in the best interests of their students to integrate their schools and combat *de facto* segregation should be granted great deference. This Court has "long recognized that local school boards have broad discretion in the management of school affairs," and that federal courts ordinarily should not interfere with local educational decisions. *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982); *see also Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools."); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Brown II*, 349 U.S. at 299 ("Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems."); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

This Court has already noted that choosing to remedy *de facto* segregated schools is within the broad discretionary power of local educational authorities. In *Swann I*, the Court stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example,

> that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

402 U.S. at 16. This sentiment was echoed in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1972), in which the Court, upholding the constitutionality of a public education-financing program, noted: "[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems." *Id.* at 43; *see also Swann II*, 402 U.S. at 45 (noting that "school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements").

The school boards for both Seattle and Louisville decided that it was in the best interest of their children to attempt to integrate their schools and that race was an appropriate and necessary factor to consider. Because that decision was well within the broad discretionary powers of their local educational officials, those school boards are entitled to judicial deference.

D. The Affirmative Steps Taken By Seattle And Louisville To Effectuate Integration In Their Schools Are Not Only Constitutional But Also Models For Other School Districts Where *De Facto* Segregation Threatens To Render Meaningless The Principles Of Brown And Its Progeny

Seattle and Louisville have taken affirmative measures to combat the growing segregation in their schools. Their local school boards have recognized the extraordinary harm of segregated education, and after careful deliberation decided on plans to try to integrate their schools. By doing so, these school systems are voluntarily following the goal of integration that this Court advanced in *Brown* and its progeny. These plans are not only constitutionally permissible, but also models for other schools districts to follow to integrate our public schools.

The use of non-racial factors alone has not proven sufficient to avoid *de facto* segregation. Obviously, adequate physical and educational resources are also needed to make the public schools attractive to all parents and students. But by not considering racial factors as well, it may be impossible to prevent the segregation of urban schools. To disallow the consideration of race for voluntarily integrating schools is effectively to eliminate a city's means to ward off *de facto* segregation. If local school boards are prevented from using race as a factor in remedying *de facto* segregation within their schools, cities will become complicit in the segregation of their public schools. It would be a bitter irony if the principles of *Brown* and its progeny, which condemned state action to create and maintain seg-